TAN TOCK KWEE & ANOR.

v.

TEY SIEW CHA & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J
[CIVIL SUIT NO: 22-225 OF 1991]
6 MAY 1995

PRACTICE & PROCEDURE: *Injunction - Principles thereof - Estate property charged to bank - Foreclosure - Order for sale - Private caveat lodged to prevent sale - Application to remove caveat - Suit by plaintiffs to set aside order for sale - Application for interim injunction to restrain dealing with property - Defence of res judicata and estoppel - Whether applicable.*

PROBATE & ADMINISTRATION: *Trust - 1st defendant executor/trustee and sole legatee under will - 1st defendant requested to consider welfare of children - Property transferred to 1st defendant - Charges executed over lands in favour of bank for benefit of one child - Foreclosure - Whether will created a trust - Whether trust breached - Whether plaintiffs acquiesced to the breach.*

PROBATE & ADMINISTRATION: *Estate property charged to 2nd defendant bank by 1st defendant trustee - Plaintiffs alleging breach of trust - Same solicitor acting for defendants - Whether solicitor's knowledge of trust could be imputed to bank - No order of Court obtained to execute charges contrary to s. 60(3) Probate & Aministration Act 1959 - Effect thereof.*

LAND LAW: *Estate property charged to bank by executor - Foreclosure - Suit filed to set aside order for sale - Whether charges obtained by fraud - Whether instruments by which charges registered come within meaning of s. 340(2)(b) NLC - Whether there was 'cause to the contrary' pursuant to s. 256(3) NLC - Whether both s. 60(3) Probate & Administration Act 1959 and s. 340(1) NLC to be complied with.*

STATUTORY INTERPRETATION: *Section 340(2)(b) NLC - "insufficient or void instrument" - Whether to be read disjunctively.*

The plaintiffs' father died leaving a will under which he appointed his wife, the 1st defendant, executor and trustee and bequeathed all his real and personal property to her. The 1st defendant transferred all the said properties to herself and on 15 May 1975, executed charges over the real property (the lands) in favour of the 2nd defendant (the bank) for the purpose of securing overdraft facilities as restitution to the bank for monies embezzled from it by one of the children of the deceased. On 12 May 1985, the bank commenced foreclosure proceedings against the 1st defendant and obtained an order for sale pursuant to the charges. The 1st plaintiff lodged a caveat to prevent the sale and the bank commenced an action for the removal of the caveat. The plaintiffs then filed a civil suit to set aside the order for sale and filed the present application for an interlocutory injunction against the bank to restrain it or its agents from dealing with the lands until the disposal of the civil suit. It was the plaintiffs' contention *inter alia* that the will created a trust which the 1st defendant had breached and that the bank had knowledge of the trust. The bank *inter alia* raised the defence of *res judicata* and estoppel.

The issues were whether there was a serious question to be tried, whether the balance of convenience lay in favour of granting the injunction, whether the parties would be

adequately compensated by damages if either one failed and whether the *status quo* should be preserved.

Held:

[1] The present suit indicates that the causes of action are not the same though the end result, i.e., to set aside the order for sale, may be the same. The order for sale under s. 256 National Land Code is not a judgment or a decree. Therefore if a chargor brings a suit and raises same or similar facts and issues raised by him in the foreclosure proceedings, there is no reason why the plaintiffs cannot bring another suit if they can show there is another cause of action against the bank.

[2] From the facts, it is possible to construe the will as a precatory trust although it may appear to be devised absolutely. Therefore, all the children will be beneficially entitled and the 1st defendant then held the said property in trust for the children, including the plaintiffs.

[3] The 1st defendant's act in charging the property amounts to benefiting one beneficiary at the expense of the others which violates the duty of impartiality owed by a trustee to the beneficiaries and constitutes a breach of trust. But the plaintiffs claimed no knowledge that the 1st defendant had charged the said property. Therefore the question of knowledge and acquiescence are best determined at trial.

[4] Where two parties employ the same solicitor, communications passing between either of them and the solicitor in his joint capacity must be disclosed in favour of the other. The knowledge of the solicitor must thus be imputed to the bank but this issue merits consideration at trial as 'knowledge' and the law applicable cannot be easily dealt with through affidavit evidence especially when the solicitor here has died.

[5] It can seriously be contended that the bank's conduct in obtaining the charges may amount to actual fraud and therefore the charges conferred defeasible interests which could be set aside.

[6] The instruments by which the charges were registered are merely voidable and not void and will remain so until they are declared void by a Court of law. The issue is the meaning of the words "insufficient or void instrument" which the Court opines should be read disjunctively, that is, "insufficient instrument" would be confined to failure to comply with the procedures or formalities laid down by the NLC whereas "void instrument" would, *inter alia*, relate to any prohibition imposed by the NLC or any written law.

[7] A void instrument can confer good title if the property is transferred to a *bona fide* purchaser for value but the plaintiffs claim that the bank had notice that the property was trust property and thus knew the charges were in contravention of s. 60(3) Probate & Administration Act 1959. Consequently the bank cannot claim to be 'a purchaser in good faith and for valuable consideration' under s. 340(2)(b) NLC and their interests remain defeasible. This is a serious question that merits consideration at the trial proper.

[8] On the issue of whether the plaintiffs' case shows that the order for sale made was contrary to law or equity, the Court is of the view that the law and facts need to be properly addressed at the trial proper and not at this interlocutory stage.

[9] When two statutes are different and a single transaction falls within the ambit of both, the provisions of both must be complied with.

[10] The plaintiffs have shown there are serious questions to be tried as to whether a trust had been created by the testator in favour of the plaintiffs and that the 1st defendant had acted in breach of trust in charging the said property and that the bank had actual or constructive notice of the trust.

[11] Considering the status of the bank, there would be no problem for the damages to be recovered by the plaintiffs. However, since the subject matter involves ancestral property no amount of damages would be sufficient to compensate the plaintiffs and the other beneficiaries. Regarding the question whether the bank would be adequately compensated, the Court can take into account the assets available to meet the undertaking and that the said property is appreciating even if the order for sale is injuncted pending the disposal of the suit.

[12] The maintenance of the *status quo* would not incur any injustice to the bank pending trial as the said lands will appreciate in value. Accordingly, this is a proper case for the Court to exercise its discretion in favour of granting the interlocutory injunction .

[Order in terms of application. Case to be fixed for early trial].

Cases referred to:

American Cyanamid v. Ethicon Ltd. [1975] AC 396 ***(refd)***
Fellows v. Fisher [1975] 2 All ER 829 ***(refd)***
Kandiah Peter v. Public Bank Berhad [1994] 1 MLJ 123 ***(foll)***
Professor Dr. Kahar Bador & Ors. v. N. Krishnan & Ors. [1983] 1 MLJ 407 ***(refd)***
Tito v. Waddell [1977] 1 Ch. 106 ***(refd)***
Overseas Chinese Banking Corporation Limited v. Lee Tan Hwa & Anor. [1989] 1 MLJ 261 ***(foll)***
Dan Sin Wah v. Chan Hai Swee [1951] 17 MLJ 185 ***(foll)***
Mohamed Isa v. Haji Ibrahim [1968] 1 MLJ 186 ***(foll)***
Public Finance Bhd. v. Narayanasamy [1971] 2 MLJ 32 ***(foll)***
Kheng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 784, [1989] 1 MLJ 460 ***(refd)***
Phuman Singh v. Kho Kwang Choon [1965] 2 MLJ 192 ***(foll)***
Lian Keow Sdn. Bhd. v. Chelliah Paramjothy & Anor. [1988] 1 CLJ 62 ***(foll)***
Cheng Hang Guan & Ors. v. Perumahan Farlim (Penang) Sdn. Bhd. & Ors. [1988] 3 MLJ 98 ***(refd)***
Ow Chor Seng v. Tjinta Pte. Ltd. (in liquidation) [1995] 1 SLR 48 ***(refd)***
Keet Gerald Francis Noel John v Mohd. Noor @ Haron bin Abdullah & Ors. [1995] 1 AMR 37 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 256(3), 340(2)(a), (2)(b)
Probate and Administration Act 1959, s. 60(3), (6)

Other sources referred to:

Hill's Law of Trusts & Trustees, 13th. Edn., p. 31
Underhill's Law of Trusts and Trustees, 13th. Edn. p. 414

For the plaintiff - G. S. Nijar (A.G. Danaraj with him); M/s. Rina Noor & Co.
For the defendant - M. Nagarajah, M/s. Shook Lin & Bok

JUDGMENT

Haidar bin Mohd Noor J:

The application for hearing before me is in respect of the amended summons-in-chambers (encl. 5) filed by the plaintiffs for an interlocutory injunction against Malayan Banking Berhad (the second defendant) restraining the second defendant, its servants or agents or

otherwise from selling, dealing etc. with the lands (14 lots in all) described therein until the disposal of the suit filed by the plaintiffs.

The lands referred to are held under:

(a) Grant No. 19949 Lot No. 720

(b) Grant No. 19950 Lot No. 721

(c) Grant No. 15766 Lot No. 189

(d) Grant No. 15764 Lot No. 187

(e) Grant No. 15460 Lot No. 195

(f) Grant No. 12869 Lot No. 51

(g) Grant No. 15767 Lot No. 190

(h) Grant No. 19814 Lot No. 214

(i) Grant No. 19815 Lot No. 215

(j) Grant No. 19816 Lot No. 216

(k) Grant No. 19817 Lot No. 217

(l) Grant No. 15507 Lot No. 117

(m) Grant No. 15508 Lot No. 118

(n) Grant No. 15765 Lot No. 188

(hereinafter referred to as "the said properties").

It is supported by the affidavit of Tan Tock Kwee (first plaintiff). The first defendant is named therein, in my view, as a nominal defendant and she is not represented. She is the mother of the plaintiffs. In the circumstances she did not take whatever steps in the proceedings including resisting or otherwise this application. The application (encl. 5) is heard *inter partes*.

Background facts

The plaintiffs' father, Tan Siong Lian (deceased), died on 26 November 1956 leaving a Will dated 22 November 1956. The first defendant was allegedly appointed executor and trustee under the Will. In the Will (TTK 1 to encl. 5) the deceased left all his property (real and personal) to his wife (first defendant) but requested that she administers the property "in fairness and justice having in mind the welfare of my children".

On 10 April 1963 the first defendant executed charges over the said properties in favour of the second defendant. On 11 April 1963 the first defendant transferred the said properties to herself. The charges ('April, 63 charges') were later discharged.

However, on 15 May 1975 the first defendant again executed charges over the said properties ('May, 75 charges') in favour of the second defendant for the purpose of securing overdraft facilities granted to Khoo Joo Eng, the wife of Tan Tock Seng, who is one of the children of the deceased. The purpose of the overdraft facilities was to provide restitution to the second defendant for monies that were embezzled from it by Tan Tock Seng.

Foreclosure action

On 12 May 1985 the second defendant commenced foreclosure action against the first defendant (Originating Summons No. 31-205-1985) in respect of the said properties charged to it. On 25 September 1989 the second defendant successfully obtained an order for sale of the said properties pursuant to the May 1975 charges. The first defendant appealed but her appeal was dismissed by the then Supreme Court on 30 April 1991 (Appeal No. 02-424 of 1989). On 23 July 1991 the second defendant obtained directions from the Court to sell the said properties and was granted an order to do so on 28 September 1991.

However, two days before the sale, that is, 26 September 1991 the first plaintiff lodged a caveat to prevent the sale. The second defendant then commenced an action against the first plaintiff in the High Court, Johor Bahru *vide* Originating Motion No. 25-31-1991 for the removal of the caveat. The plaintiffs subsequently filed Civil Suit No. 22-225-1991, *inter alia*, to set aside the order of sale of the said properties obtained by the second defendant and for consequential orders thereto.

It was agreed that Originating Motion No. 25-31-1991 be stood down until the disposal of Civil Suit No. 22-225-1991 for which the summons-in-chambers (encl. 5) is presently for hearing before me.

Civil Suit No. 22-225-1991

In this suit the plaintiffs claim against first defendant:

(a) A declaration that the children of Tan Siong Lian, deceased including the plaintiffs under the Will dated 22 November 1956 are the beneficial owners of the said properties.

(b) A declaration that the first defendant being the personal representative of the plaintiffs' father's estate holds the said properties in trust for the beneficiaries including the plaintiffs.

(c) A declaration that the transfer of the said properties from the first defendant as representative to the first defendant herself was null and void.

As against the second defendant, the plaintiffs claim:

(a) A declaration that the said properties form part of the estate of Tan Siong Lian, deceased and that they are trust properties.

(b) A declaration that the said properties cannot be the subject of charges to the second defendant.

(c) A declaration that the charges obtained by the second defendant on 15 May 1975 are null and void.

(d) An order that the order for sale, the auction and other related orders in respect of the said properties be set aside.

(e) An order that the second defendant whether by itself, its servants and/or agents be restrained from prosecuting and/or conducting any inquiry and/or commencing any action in respect of the said properties.

As against both the first and second defendants:

An order that the Registrar of Titles cancel the entries from the register in respect of the said transfer and charges and that the second defendant do submit the documents of titles to the said properties for the purpose of effecting such cancellation and upon completion thereof to return the documents of titles to the plaintiffs or to such other person or persons as this Honourable Court deems fit.

Injunction

In considering the exercise of the discretionary power of the Court in respect of whether to grant an injunction or otherwise, the oft quoted case of *American Cyanamid v. Ethicon Ltd.* [1975] AC 396 sets out the principles and Sir John Pennycuik in *Fellows v. Fisher* [1975] 2 All ER 829 at page 843 summarised the principles as follows:

1. Provided that the Court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a *prima facie* case.
2. The Court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief.
3. 'As to that' the Court should first consider whether, if the plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory injunction should normally be granted.
4. If damages would not provide an adequate remedy the Court then considers whether, if the plaintiff fails, the defendant would be adequately compensated under the plaintiff's undertaking in damages, in which case there would be no reason on this ground to refuse an interlocutory injunction.
5. Then one goes on to consider all other matters relevant to the balance of convenience, an important factor in the balance, should this otherwise be even, being the preservation of the '*status quo*'. By the expression '*status quo*', I understand to be meant the position prevailing when the defendant embarked on the activity sought to be restrained.
6. Finally, and apparently only when the balance still appears even, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence ...'.

Before considering the principles involved in an application for injunction, it is better to consider the issue of law, that is, *res judicata*/estoppel raised by the second defendant's Counsel. If the second defendant succeeds on this issue, then the injunction will be refused.

a. *Res Judicata/estoppel*

An examination of the foreclosure proceedings and the present suit would seem to indicate that the causes of action are not the same though perhaps the end result as against the second defendant may, *inter alia*, be the same, that is, to set aside the order of sale of the said properties. However, the principle of *res judicata* and estoppel in a similar fact situation as the present case was considered by the Supreme Court in *Kandiah Peter v. Public Bank Berhad* [1994] 1 MLJ where at page 123 it was held:

> In our judgment, where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought by the chargee under s. 256 of the Code, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale had been made) and raising in that action the same or similar facts and issues as that raised by him in the foreclosure proceedings. Neither *res judicata* nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.

Mr. Nagarajah, Counsel for the second defendant, tried with his usual candour to distinguish the present proceedings with *Kandiah Peter's* case by submitting that the foreclosure proceedings has been **almost** converted into a writ action. He said so because oral evidence was led thereto before an order for sale was made and in the result "the order for sale made at the end of the proceedings is an order or judgment in the wider sense, that is, the rights of the parties have been determined and an order was made on the merits of the case (see pages 23/24 of his written submission). With respect, I am unable to agree with such a contention as clearly according to *Kandiah Peter's* case at page 122 "The order for sale when made under s. 256 is not a judgment or a decree". Likewise, if a chargor can bring a suit and raises in the suit same or similar facts and issues as those raised by him in the foreclosure proceedings, I do not see why the plaintiffs cannot bring another suit so long as they can show that there is a cause of action against the second defendant. In this case, the plaintiffs' cause of action would appear to be in their interests as beneficiaries in the said properties which they claim are trust properties. In the event I am of the opinion that the second defendant fails on this issue.

b. *Serious questions*

The serious questions may be one of law, facts or both. All that the plaintiffs need to do in their application is to show that they have a fair question to raise as to the existence of their legal rights which they allege. They are not required to make out a clear legal title (see *Professor Dr. Kahar Bador & Ors. v. N. Krishnan & Ors.* [1983] 1 MLJ 407).

Mr. Nijar, Counsel for the plaintiffs, raised the following issues, which according to him, merit consideration at a trial.

(i) Did the Will create a trust?

The question arises as to whether the testator, Tan Siong Lian, by his Will dated 22 November 1956 created a trust over all of his properties in favour of his wife and children (including the plaintiffs).

In construing the creation of a trust it is sufficient that the settlor evinces with reasonable certainty:

(a) an intent to create a trust;

(b) the trust property;

(c) the persons (individual or corporate) intended to be beneficiaries, and the purpose of the trust so that the trust is administratively workable and capricious.

(See *Hill's Law of Trusts & Trustees*, 13th. Edition, page 31).

At this stage it is not right for me to consider whether a trust is created or not but suffice for me to say that in view of the authorities in support thereof and the facts of this case, it is possible, in my view, to construe the Will as a precatory trust although it may appear to be devised absolutely. In such an event all the children will be beneficially entitled. If that be the case the first defendant then held the said properties in trust for children (including the plaintiffs).

(ii) Did the first defendant act in breach of the trust?

The term 'breach of trust' was considered by Megarry VC in *Tito v. Waddell* [1977] 1 Ch. 106 and according to him "a trustee commits a breach of trust if he violates any duty which he owes as trustee to the beneficiaries".

One of the duties of a trustee to the beneficiaries is the duty to act impartially between the beneficiaries. According to *Underhill's Law of Trusts and Trustees*, 13th. Edition at page 414:

> A trustee must be impartial in the execution of his trust, and not exercise his powers so as to confer an advantage on one beneficiary at the expense of the other.

In the present case, the first defendant as the alleged trustee had charged the said properties on 15 May 1975 to raise money to provide restitution to the second defendant for the monies embezzled from the second defendant by one of the beneficiaries, that is, Tan Tock Seng. The purpose was to prevent Tan Tock Seng from being prosecuted. This act of the first defendant amounts to benefiting one beneficiary at the expense of the others. That amounts to a violation of the duty of impartiality that is owed by the trustee to the beneficiaries and constitutes a breach of trust. However, the issue is whether the plaintiffs consented or acquiesced in this breach of trust. According to the plaintiffs they had no knowledge that the first defendant had charged the said properties to the second defendant and gave their reasons. In my view the question of knowledge and consent or acquiescence are best determined at the trial where oral evidence as opposed to affidavit evidence will assist the Court in making such a determination.

(iii) Did the second defendant know of the trust?

From the facts it is not disputed that the same solicitor, that is, the late Mr. Chelliah Paramjothy acted for both the first defendant and the second defendant in arranging and discharging the 1963 charges. He also acted for the first defendant in effecting the transfer from the first defendant as a personal representative to herself on 11 April 1963 and in obtaining the grant of probate of the Will on 2 February 1959. Mr. Paramjothy prepared the petition and was aware of the Will and that the said properties appeared to be held on trust and that the said properties were vested in the first defendant as representative. The question is whether the knowledge of the second defendant regarding the first defendant being the trustee of the said properties and the said properties vested in the first defendant as representative is to be imputed from the knowledge of Chelliah Paramjothy, the solicitor acting for the second defendant as well as the first defendant. In this respect, Eusoff Chin J (as he then was) in *Overseas Chinese Banking Corporation Limited v. Lee Tan Hwa & Anor.* [1989] 1 MLJ 261, held:

> the rule is that where two parties employ the same solicitor, communications passing between either of them and the solicitor in his joint capacity must be disclosed in favour of the other, and further where the evidence showed that a party had placed himself entirely in the hands of his solicitor and constituted him his general agent in the transactions, the knowledge of the solicitor must be imputed to him; *Dixon v. Winch* [1900] 1 Ch. D 736.

In my view, this issue merits consideration at the trial as 'knowledge' and the law applicable thereto could not easily be dealt with through affidavit evidence especially when the solicitor acting for both defendants had died.

(iv) Whether the second defendant acted fraudulently in obtaining the charges?

Fraud is an exception to the concept of indefeasibility of title under s. 340(2)(a) of the National Land Code, 1965 ('NLC'). The question that arises is whether the second defendant obtained the charges from the first defendant by means of fraud. Fraud, for the purposes of vitiating a title to land held under the Torrens System must be actual fraud.

Mr. Nijar, Counsel for the plaintiffs relied on and discussed at length a number of authorities to show the thoughts of the Courts in relation to the issue of fraud. It is not for me at this stage to determine whether actual fraud was committed by the second defendant in the execution of the charges. What I need to be satisfied is whether the facts would seem to point in that direction.

On the authorities of *Dan Sin Wah v. Chan Hai Swee* [1951] 17 MLJ 185, *Mohamed Isa v. Haji Ibrahim* [1968] 1 MLJ 186 and *Public Finance Bhd. v. Narayanasamy* [1971] 2 MLJ 32, and the issues discussed by me earlier on, it can seriously be contended that the second defendant's conduct in obtaining the charges may amount to actual fraud and therefore the charges would only confer defeasible interests which could be set aside.

I agree with Mr. Nagarajah, Counsel for the second defendant, that in this case, no particulars of fraud had been set out in the statement of claim. Be that as it may, as this is not a trial proper yet, it is still open to the plaintiffs to make application for amendment of the statement of claim to that effect. Whether the plaintiffs will succeed or not is not a matter for me at this stage to speculate.

As regards to Mr. Nagarajah's contention that the plaintiffs must demonstrate that the transfer executed by the first defendant (the chargor) was with the intention of cheating the plaintiffs, in my opinion, this is a matter of evidence at the trial in view of the peculiar circumstances that led to the execution of the charges by the first defendant. The plaintiffs had at least shown that the execution of the charges by the first defendant would affect the interests of the plaintiffs as one of the beneficiaries.

(v) Effect of s. 60(3) of the Probate and Administration Act, 1959.

Section 60(3) of the Probate and Administration Act, 1959 reads:

> A personal representative may charge, mortgage or otherwise dispose of all or any property vested in him, as he may think proper, subject to any restriction which may be imposed in this behalf by the Will of the deceased, and subject to this section:
>
> Provided that an executor may dispose of any property nothwithstanding any restriction so imposed, if he does so in accordance with an order of the Court.

Mr. Nijar submitted that the last paragraph of the Will imposes a restriction within the meaning of s. 60(3). He went one step further by submitting that even if the last paragraph of the Will did not constitute a precatory trust, it could well qualify as a restriction within the meaning of s. 60(3). As the first defendant did not obtain an order of the Court before executing the charges over the said properties in favour of the second defendant, he claimed that this amounted to a contravention of s. 60(3).

Mr. Nijar next relied on s. 60(6) of the Probate and Administration Act, 1959 which reads:

> the disposal of property by a personal representative in contravention of this section shall be voidable at the instance of any other person interested in the property.

It was submitted that the plaintiffs as beneficiaries under the trust qualify as 'person interested in the property' within the meaning of s. 60(6).

In the event that an order of the Court is required, the issue for consideration is whether the instruments by which the charges were registered come within the meaning of s. 340(2)(b) of the NLC which reads:

The title or interest of any such person or body shall not be indefeasible:

(a) ...

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument, or

(c) ...

It would appear that the instruments by which the charges were registered are merely voidable and not void. They will remain voidable until they are declared to be void by a Court of Law. In so far as this case is concerned, the issue for determination is the meaning of the words 'insufficient or void instrument'. A serious question arises as to whether the words 'void instrument' might not include 'voidable instrument' or whether the latter might still fall within the meaning of the expression 'insufficient instrument', The NLC does not define the term 'insufficient or void instrument'. According to Judith Sihombing's *National Land Code* 'insufficient' does not apparently complement 'void' but acts as a separate category by itself. I am of the opinion that the words 'insufficient' or 'void' should be read disjunctively, that is, 'insufficient instrument' would be confined to failure to comply with the procedures or formalities laid down by the NLC whereas 'void instrument' would, *inter alia*, relate to any prohibition imposed by NLC or any written law. Be that as it may, this is a difficult question of law that needs to be addressed in depth having regard to the facts of the case.

However, it is not disputed that an insufficient or void instrument can act as a good title if the property is ultimately transferred to a *bona fide* purchaser for value as perhaps in this case. But, the plaintiffs claim that the second defendant had the notice that the said properties were vested in the first defendant as 'representative' and in that event the second defendant knew that the charges were in contravention of s. 60(3) of the Probate and Administration Act, 1959. If that be the case then the second defendant cannot claim to be 'a purchaser in good faith and for valuable consideration' under s. 340(2)(b) of NLC. In that event the interests of the second defendant remain defeasible by virtue of s. 340(2)(b) of NLC. This is a serious question that merits consideration at the trial proper.

(vi). Is there a cause to the contrary within s. 256(3) of NLC?

The phrase 'cause to the contrary' was considered by the Federal Court in *Kheng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 784. Even though the Federal Court's decision was overturned by the Privy Council, the Privy Council did not disagree with the meaning that was attributed to the said phrase when it said in *Kheng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors.* [1989] 1 MLJ at page 460:

> ... these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity ...

At issue here is whether the plaintiffs' case had shown that the order for the sale made was contrary to law or equity. The plaintiffs are relying on their rights as innocent third parties in which they are beneficiaries under the trust and they had never acquiesced in the charges. A number of authorities were relied on by Mr. Nijar, Counsel for the plaintiffs in support of his argument in respect of the phrase 'contrary to law or equity' but suffice for me to say that such contention in relation to the authorities and the facts is not 'hopeless' that need no consideration at a trial proper. I am of the view that the law and the facts need to be properly addressed at the trial proper and not at this interlocutory stage and indeed the law is quite complex.

There is the further need to consider whether voidability under s. 60(6) of the Probate and Administration Act, 1959 is cured by registration under NLC and if not, is the former 'a cause to the contrary'? The plaintiffs' Counsel contended that leave of the Court is required in respect of the charge of the said properties and the consequence of not obtaining leave of the Court is that the charges are rendered voidable under s. 60(6) of the Probate and Administration Act, 1959. It was contended that there is a need to comply with both s. 60(3) of the Probate and Administration Act, 1959 and s. 340(l) of NLC as both legislations have different objects. Thomson LP in *Phuman Singh v. Kho Kwang Choon* [1965] 2 MLJ at page 192 said:

> It has been argued that the documents were properly attested and registered under the Land Code and that amounts to compliance with the provisions of the Moneylenders Ordinance. The argument is without substance. The two statutes are different ... and when a single transaction falls within the ambit of both then the provisions of both must be complied with.

According to the plaintiffs, this is not a case where the plaintiffs are relying on their own wrong to gain a favourable interpretation of the law. The party who was responsible for obtaining leave of the Court for the charges and who failed to do it is the first defendant and the second defendant was knowingly involved in this failure. These facts, in my view, could properly be determined at the trial proper.

(vii) The claim of indefeasibility of title by the second defendant

Indefeasibility of title may be set aside if one or more of the circumstances set out in s. 340(2) of NLC is or are satisfied. Yusof Abdul Rashid J in *Lian Keow Sdn. Bhd. v. Chelliah Paramjothy & Anor.* [1988] 1 CLJ at pages 62-63, said:

> In the instant case, on the assumption that the second defendant knew that the said land was held by the first defendant in trust for the plaintiffs, "there was wilful and deliberate participation in a breach of trust, well known to be such by both parties". In the result the second defendants' indefeasible interest in the said land may be determined under s. 340(4)(b) of the National Land Code. In my judgment a stranger may be held liable to the beneficiary of a trust if he dishonestly allows himself to be used as an instrument of a breach of trust.

From the issues raised and relied on by the plaintiffs, it would seem to me that the plaintiffs had shown that there are serious questions to be tried as to whether a trust had been created by the testator in favour of the plaintiffs and that the first defendant had acted in breach of the trust in charging the said properties and that the second defendant had actual or constructive notice of the trust. It is therefore not for me to determine these issues at the interlocutory proceedings having regard to the facts and the law.

Having ruled that there are serious questions to be considered at the trial, I then move on to consider the 'balance of convenience' issue. As to that I have to consider whether if the plaintiffs succeed they would be adequately compensated by damages for the loss between the application and the trial.

Granted that looking at the status of the second defendant, there would be no problem for the damages to be recovered by the plaintiffs. However, I am of the view that since the subject matter involved ancestral properties and if allowed to be sold pending the trial, no amount of damages would be sufficient to compensate the plaintiffs and the other beneficiaries. In any event, if the plaintiffs can show that some proprietary or equitable

right has been vested in them which is being threatened they can obtain an injunction as of right (see *Cheng Hang Guan & Ors. v. Perumahan Farlim (Penang) Sdn. Bhd. & Ors.* [1988] 3 MLJ at page 98).

In regard to the question if the plaintiffs fail, whether the second defendant would be adequately compensated, the answer to that is that I can take into account that assets are available to meet the undertaking and further, the said properties are appreciating to considerable value even if the order for sale is injuncted pending the disposal of this suit. (*Ow Chor Seng v Tjinta Pte. Ltd. (in liquidation)* [1995] 1 SLR 48).

It has been held also that if injustice to the plaintiff is so manifest the Court is entitled to even dispense with the usual undertaking as to damages (*Keet Gerald Francis Noel John v Mohd. Noor @ Haron bin Abdullah & Ors.* [1995] 1 AMR 37 page 391).

The next question to consider is whether the *status quo* should be maintained in this case.

Mr. Nagarajah, Counsel for the second defendant, maintained that since there is a private caveat entered onto the said properties by the plaintiffs, the effect of an interlocutory injunction is the same to that of a private caveat, that is, restraining dealings affecting the said properties. Therefore, according to him, there is thus no necessity for granting the interlocutory injunction. I will agree with him if there is no action taken to set aside the private caveat. However, by Originating Summons No. 25-31-91 which was stood down, the second defendant is applying for an order to remove the private caveat filed by the plaintiffs in respect of the said properties. Therefore, this issue is irrelevant for the purpose of considering the '*status quo*' issue.

In my view, the maintenance of the *status quo* would not incur in any injustice to the second defendant pending the trial, as I said earlier, the said properties being lands, would tend to appreciate in value. There is no evidence that the said properties would be developed by the second defendant but rather to proceed with the sale so that the monies can be recovered by the second defendant.

For the reasons set out by me I am of the view that this is a proper case for me to exercise my discretion in favour of granting the interlocutory injunction and I do make an order in terms of the application. However, I would direct that in the interests of both parties and in view of the fact that this is a 1991 case, this case be fixed and heard early. The parties are therefore directed to take the necessary steps for this case to be ready for early trial.